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August 2, 2007

Via electronic & U.S. mail

Nancy M. Morris
Secretary
Securities and Exchange Commission
100 F Street NE
Washington, DC 20549-1090

Re: File Numbers S7-17-07 and S7-16-07

Dear Ms. Morris:

We are writing to comment on the U.S. Securities and Exchange Commission's proposed rules regarding shareholder resolutions related to the election of directors. We are also providing comments on the questions posed by the Commission regarding the filing of non-binding resolutions under Rule 14a-8 as part of Release No. 34-56160.

The Commission should reject both proposed rules.[1] The Commission should not embark on this unprecedented and damaging rollback of shareholder rights. We believe the Commission, in adopting Release No. 34-56160, adopted the proper principle—that proxy access is a fit subject for shareholder proposals under Rule 14a-8. The Commission should now act consistently with that principle and adopt neither proposed rule, leaving in place the Second Circuit's decision in AFSCME v. AIG.[2] In that decision, the U.S. Court of Appeals for the Second Circuit found that under the current text of Rule 14a-8, proxy access is a proper subject for a shareholder proposal required to be included in an issuer's proxy.

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[1] Rule S7-17-07 simply takes away the right of shareholders to raise the issue of giving shareholder-nominated director candidates access to the company proxy. Rule S7-16-07 creates such heavy burdens in the exercise of this right as to make it a dead letter.

[2] It is very clear as a result of discussions at the Commission's July open meeting between Commissioners and staff that in the absence of rulemaking the Staff considers the AIG decision good law.

Proxy access is the idea that a significant block of long-term shareholders in a public company should be able to nominate a minority of independent directors and have their candidates included on management's proxy solicitation. Proxy access is designed to be a mechanism to encourage the placement of genuinely independent directors on company boards. Proxy access proposals give long-term significant shareholders a real voice in board composition without facilitating a change in control. It is a corporate governance feature well suited to index funds and other long-term investors for whom selling their stock in a company with poor governance is not an option.

While the Commission has, in the past, considered making a form of proxy access effectively mandatory through its power to regulate the proxy, the current rulemaking addresses the circumstances in which shareholders may seek to use the shareholder proposal process to change corporate governance at individual companies to include a proxy access right.[3] This is the process by which shareholders have urged companies to adopt a number of other changes with arguably substantially greater impact on both the board election process, such as removing classified boards, and on the ability of companies to resist takeover bids, such as limiting companies' ability to adopt poison pills. There is no good argument for why in this context proxy access should be a taboo subject in the shareholder proposal process, as Release No. 34-56161 would make it, or subject to special requirements that make it highly unlikely a proxy access proposal would ever be successfully brought, as Release No. 34-56160 would do.

The continuing scandals involving public companies, including backdating of management stock options and unjustified executive pay awards, demonstrate the persistence of problems relating to the board oversight of public company management. Allowing shareholders to raise the issue of proxy access through the ordinary corporate governance process is a common sense and inexpensive way to address these continuing problems in our governance system.

More broadly, the current Rule 14a-8 concerning non-binding resolutions has worked well for more than 30 years to allow investors to raise significant policy issues and reach agreements with corporations that are in the long-term interests of all shareholders. The Commission has not in the past limited shareholder rights in area. To do so now, as some of the questions posed in Release No. 34-56160 suggest, would represent a radical rollback of shareholder rights by the Commission.

Finally, Commissioner Roel Campos has left the Commission and Commissioner Annette Nazareth has announced her intention to leave the Commission. The Commission should

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[3] Release Nos. 34-48626; IC-26206; FILE NO. S7-19-03. "Proposed Rule: Security Holder Director Nominations," (Oct. 14, 2003). 17 CFR PARTS 240, 249 and 274.

at the least defer action on these far-reaching proposed rules until a full complement of Commissioners is able to give any proposed changes their full attention.

The AFL-CIO is the federation of America's labor unions, with 55 member unions representing over 10 million workers. Union sponsored pension plans hold approximately $400 billion in assets and are beneficial shareholders of corporate issuers through banks, brokers, and other custodians. Union members participate in benefit plans with over $5 trillion in assets, and union members also participate in the capital markets as individual investors. Most worker assets are invested broadly for with very long-term goals in mind, and an increasingly portion of these assets are invested in indexed or quasi-indexed strategies.

In this comment, we seek to address certain broad issues raised by the Commission in its releases, to wit, 1) whether there is a need for rulemaking at all, 2) the relationship between Rule 14a-8 and substantive state corporate law, and 3) the treatment of election-related proposals under Rule 14a-8. We will then address the specific issues raised by the heightened submission requirements under Release No. 34-56160.

Background—Rule 14a-8 and State Law

Rule 14a-8 embodies the Commission's view, dating back to the 1940's, of the mandate given the Commission by Congress in Section 14 of the Securities Exchange Act of 1934. That mandate is to issue such regulations "as necessary or appropriate in the public interest or for the protection of investors" to regulate the content of proxy solicitations directed toward the shareholders of public companies.[4] The Commission's view has remained through five decades that investors' interest and the public interest required management's proxy solicitations include certain types of shareholder proposals brought before the meeting by non-management shareholders.

Rule 14a-8 developed against a background of state law, most notably in Delaware, that clearly allowed a very wide variety of matters to be raised at company annual meetings, including precatory or non-binding proposals on virtually any subject.[5] Rule 14a-8 has since its inception included a provision barring the inclusion in management's proxy of proposals that violate the relevant state law. Assertions that have been made at various Commission roundtables that precatory proposals are a creation of federal law or somehow at odds with state law are inaccurate. Precatory proposals, like binding proposals, are the creation of state law and company specific governance. Rule 14a-8 has always operated to distinguish which items among a very broad universe of proper

[4] 15 U.S.C. 78a.
[5] 8 Del. C. § 211.

precatory and binding proposals under state law are significant enough to be required to be included on management's proxy.

However, there has been long-running uncertainty as to the rights under state law of shareholders to bring binding proposals in the form of bylaw amendments.[6] Certain issues, it is clear, cannot be the subject of binding shareholder proposals because a binding proposal would require a charter amendment. The most common example of such an issue is efforts to declassify boards of directors. There appears to be some consensus that binding proposals addressing the director election process are valid, at least under Delaware law. However, there is little case law even addressing that point. The corporate community has long asserted that the language in the Delaware code that vests the management of the corporation in its board generally limits the subject matter of shareholder-initiated bylaws.[7] In addition, the corporate bar has argued that specific language in various places in the code empowering the board to, for example, decide when to issue stock or when to declare a dividend, makes clear those issues cannot be decided by shareholder initiative.

Shareholder advocates have argued that shareholder rights to bring binding bylaws forward are much broader than the corporate bar's view. However, while the corporate bar's views have been rejected by courts in some jurisdictions, these issues in Delaware have not been litigated sufficiently for the Commission to in any respect be certain as to what the boundaries are of permissible binding proposals.

Against this background, the Commission and its staff have taken the view for decades that both precatory and binding proposals can raise significant issues for public companies. Consequently, Rule 14a-8 provides shareholders must be given the opportunity to have both sides of those issues included in management's solicitation materials and be given the opportunity to direct that their shares be cast in whatever manner they choose on those proposals even though they are voting on management's card.

This approach has led to the development in general of a healthy shareholder proposal system in which most shareholder proponents file valid precatory proposals under state law. Shareholders prefer to file precatory proposals either because they are not certain binding proposals would be valid, or more likely because the precatory format allows for

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[6] As the Delaware Court observes recently, "There is equally no reason to believe that this bylaw is obviously invalid, in the way that an attempt to adopt a bylaw that abolishes the board of directors, or, as was suggested at oral argument, attempts to force the board to meet only at the North Pole in the dead of winter, would be. On those unrealistic facts, the court might well feel compelled to exercise its discretion in advance of a vote in an effort to curb a wasteful proxy process. But that is not the situation here." Bebchuk v. CA, Inc., 902 A.2d 737, 742.

[7] 8 Del. C. § 141(a).

a genuine expression of shareholder opinion while leaving what can be quite complex implementation issues to the board and management. In areas like executive pay, filing precatory proposals is in many cases the only practical way to express shareholder sentiment.

At the center of the Commission's regulation of what kinds of proposals should be required to be included in a company's proxy materials is the idea of materiality. Proposals that must be included are those that the Commission believes other shareholders would want a chance to be heard on. So proposals addressing ordinary business issues or personal grievances are not required to be included. The Commission's proposed approach to proxy access turns this idea on its head. The proposed rules do not seek to exclude proposals on proxy access because they are too trivial or narrow an issue for the shareholders as a whole. Such proposals certainly do not violate state law. Rather the draft rules appear to either ban or make it very difficult to file a proxy access proposal because they suggest these proposals are too powerful, too fundamental an issue in the governance of a public company for the shareholders to be allowed to express themselves.

Rule 14a-8 and Director Elections

Within the shareholder proposal system, shareholders have long filed proposals that affect the conduct of director elections. These proposals include precatory proposals seeking to declassify boards, precatory and binding proposals seeking to have companies adopt a majority vote rule for director elections, proposals seeking confidential voting, proposals asking companies to make efforts to diversify their boards along gender and racial lines, and so forth. Until the 1990's, proxy access proposals were viewed by the staff as another proper formulation of an election-related shareholder proposal.

It is unclear in this context what the legal rationale is for the view that the Second Circuit decision in the AIG case creates any problem at all for the Commission. Despite the rhetoric about national uniformity in the Securities laws, there is no conflict here among the circuits. The obvious route to uniformity is for the Commission staff to adopt the Second Circuit decision.

A Second concern could be that the Second Circuit decision opens the way for shareholder proposals whose consideration by public companies would in some way be inconsistent with the orderly functioning of the corporate governance process. However, in the 2007 proxy season, proxy access proposals were voted on at two large capitalization companies, Hewlett-Packard and United HealthCare. No evidence has been produced by anyone that these votes led to any procedural difficulties or were in any manner different from other votes on other shareholder proposals under Rule 14a-8, other

than the unusually high levels of investor support the proposals received for first time initiatives, in both cases over 40%.

A third concern could be that having companies adopt proxy access creates difficulties for the Commission's regulatory scheme. This has often seemed to be the view of some at the Commission. This view has fundamental problems. Most importantly, no one has asserted that a provision for access to management's proxy for shareholder nominated candidates would violate state corporate law. Public companies such as Marsh McLennan and Risk Metrics have voluntarily adopted versions of proxy access. This view would seem to imply that a public company must not have proxy access as a feature of its articles and by laws. That position, however, is clearly contrary to the Business Roundtable decision on dual class voting, which stated that the Commission does not have the authority to make the adoption of a particular state law governance regime a condition of a company being allowed to enter the public markets.[8]

There is an important point embedded here. The issue of bringing 14a-8 proposals on proxy access is not a mandatory proxy access rule. It does not put the Commission in the position of having to specify how proxy access would work at any given company. The burden will rest on shareholders and companies to conform any proxy access initiative they adopt as a result of the 14a-8 process to the Commission's existing proxy rules and the Williams Act. This is fundamentally why the AIG decision poses no threat at all to the existing Securities regulatory structure.

In summary, while Rule 14a-8 has never been a proper vehicle for an actual director election contest, it has always been used to attempt changes in the rules by which corporate directors are elected, including changes that were clearly designed to make contested elections more likely. There is no structural argument for why the Commission must act to undo the AIG decision.

<u>Proposed Rule Concerning "Shareholder Proposals Relating to the Election of Directors"</u>

In its proposed rule concerning "Shareholder Proposals Relating to the Election of Directors," the Commission proposes to amend Rule 14a-8 to exclude shareholder proposals that "would set up a process for shareholders to conduct an election contest in the future by requiring the company to include shareholders' director nominees in the company's proxy materials for subsequent meetings."

The Commission's proposed rules regarding the election of directors would take away the current right established by the court in the AIG case to put forward their ideas for a

[8] Business Roundtable v. SEC, 905 F.2d 406, 411 (D.C. Cir. 1990).

process by which shareholders in a non-control contest situation could participate in the election of directors who represent shareholders' interests in the boardroom. Shareholder rights in this area are already very limited. By further limiting shareholder rights in this area, the proposed rules would entrench insider dominance of the nomination and election process.

While state laws allow shareholders to nominate their own directors, this is not a realistic option for even substantial shareholders in large public companies. The cost of undertaking a proxy contest to remove directors can run into the millions of dollars. The result is that, management picks board members with little to no input from shareholders. In 2006, only 80 companies were subject to proxy fights for the board of directors.[9] This number represents a minuscule percentage of the 2,331 U.S. companies currently traded on the New York Stock Exchange[10] and the 3,200 currently traded on NASDAQ[11]. Furthermore, when proxy fights occur they tend to be at smaller companies where shareholders have launched a contest for control. Proxy access is a mechanism for long-term shareholders who wish to ensure there are strong independent directors, but who may not be interested in taking control of the companies they invest in.

The Commission should not engage in an unprecedented rollback of shareholder rights in this area before investors have even had the chance to exercise them. Consequently, the AFL-CIO strongly opposes the Commission's proposed rule concerning "Shareholder Proposals Relating to the Election of Directors" and urges the Commission to reject it for being inconsistent with the interests of long-term investors.

b) Proposed Amendment to Rule 14a-8(i)(8) Concerning Bylaw Amendments on Procedures for Shareholder Nominations of Directors

We commend the Commission for, in this proposal, embracing in theory the concept that shareholders should, subject to certain rules, have access to the proxy statement for their director nominees. However, Release No. 34-56160 would impose a variety of extraordinary burdens that would make it practically impossible for shareholders to bring forward resolutions raising the subject of proxy access such as those brought at Hewlett-Packard and UnitedHealth. We conclude that it would best serve shareholder rights if the Commission were not to adopt the rules that it has proposed in this area.

In its proposed amendment to Rule 14a-8, the Commission outlines a rule whereby it will allow proposals raising the issue of proxy access for shareholder director nominations but

[9] Institutional Shareholder Services, "2006 Postseason Report: Spotlight on Executive Pay and Board Accountability, p27
[10] http://nysedata.com/factbook
[11] http://www.nasdaq.com/reference/market_facts.stm

only in the form of binding bylaws. The Commission gives no reason why it is seeking to privilege only binding resolutions. The AFL-CIO considers it to be unreasonably restrictive to exclude non-binding resolutions on this subject.

i) Filing Requirements

The Commission proposal would also require proponents to hold 5% or more of the company's stock for one year or longer. The AFL-CIO considers this 5% threshold to be so high as to make it virtually impossible for shareholders to file such resolutions. Although institutional investors collectively own more than 60% of outstanding U.S. equities, the number of public pension funds that file shareholder resolutions account for a much smaller percent of the total U.S. equity market.[12] Preliminary research by the Council of Institutional Investors indicates that, even if the ten largest public pension funds were to aggregate their holdings, those funds combined would not meet the 5% threshold.[13]

We do not believe there is any valid argument for treating proxy access proposals differently in terms of holding requirements than other proposals under Rule 14a-8. However, if the Commission were to proceed in that direction, we believe it should move in the direction of greater flexibility in terms of the holding size thresholds and longer holding requirements.

In terms of holding size, the Commission's purpose in the draft rule appears to be to ensure proponents had sufficient assets invested in the company to provide some assurance that their sponsorship of the proposal was aimed at promoting the best interests of the firm and other investors. The proposed 5% requirement would say that investors in large companies with hundreds of millions or billions of dollars of assets in a single company were not really invested in the company's prospects. That is not a credible basis for rulemaking. As an alternative, the Commission might look at sliding scales related to market capitalization.

The AFL-CIO considers the one-year holding period to be too short. By making the holding period only one year, the Commission would enable investors with short-term horizons, such as hedge funds, to use proxy access as a tool for extracting short-term gain at the expense of the interests of long-term shareholders. A more reasonable holding period is two years or more. This would be in line with recent efforts by the business and investor community to promote longer-term perspectives and practices in the capital markets. In August 2007, the AFL-CIO, Council of Institutional Investors, Business Roundtable and others in the corporate and investor communities created the Aspen

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[12] The Conference Board, Institutional Investment Report 29 (2007)
[13] Council on Institutional Investors letter to the Securities & Exchange Commission (August 24, 2007)

Principles to counter short-term pressure in the capital markets and work for long-term value creation.[14]

ii) Disclosure Requirements

Finally, Release No. 34-56160 couples this unrealistically high threshold with overly detailed, burdensome and vague requirements for disclosure by both shareholders and companies. These requirements are both substantively more burdensome than those imposed on 5% holders who are seeking to take over companies, and represent completely new approaches to disclosure regulation whose meaning and reach are uncertain. These disclosure provisions amount to a near total deterrent to institutional investors considering filing an access proposal because of both the extent of the disclosure required and the uncertainty as to what that extent really is.

There are, as a general matter, three disclosure regimes currently in the area of proxy materials and corporate governance. First, there is the disclosure system for proponents under Rule 14a-8. Then there are the requirements the staff enforces for shareholders conducting independent solicitations. Finally, there are the disclosure requirements for 5% holders under the Williams Act. No persuasive case has been made as to why proxy access proposals, rather than say majority vote proposals, require a more burdensome disclosure regime. More dramatically, it seems absurd to have disclosure requirements for simply filing a shareholder proposal that are greater than the requirements associated with a control contest or a potentially controlling holding (the 5% rules).

Some have asserted that proxy access shareholder proposals represent a unique threat of abuse by shareholders with interests that are aligned with the interests of other shareholders. This is precisely, however, what the Williams Act and the proxy solicitation regulatory system are concerned with—to wit, the possibility that a person accumulating stock in a company may be looking to acquire the company at a discount to its real value, thus harming other shareholders, or in the case of management, that a proxy is being solicited that is designed to enrich or entrench management at the expense of the shareholders whose proxies are being solicited. There has been no showing that proxy access represents a threat of this sort of conduct that requires disclosures more burdensome and more open ended than the disclosures required of those who would mount an actual takeover of the company.

These provisions would have both a chilling effect on existing productive dialogue between companies and their shareholders. It would also pose, not only an unreasonably

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[14] http://www.aspeninstitute.org/atf/cf/%7BDEB6F227-659B-4EC8-8F84-8DF23CA704F5%7D/FinalPrinciplesAug07.electronic.pdf

high hurdle, but also an effective deterrent to filing a proposal concerning shareholder director nominations.

For instance, Release No. 34-56160 would require information about the shareholders' dealings with the company and the company's competitors during (a) the 12 month period before plans were formed to submit the proposal and (b) the time that a proposal is pending.

This provision alone would have an enormous chilling effect on communication between shareholders and corporate management. Both shareholders and corporate management would have to keep careful record of all company dialogues in case (a) the shareholders filed a resolution at the company in question or (b) the shareholders filed a resolution at a company in the same industry as a company with which it had engaged in dialogue.

Shareholders and corporate management are continually engaged in informal dialogue that can often lead to the resolution of issues without resorting to formal shareholder proposals or even litigation. Placing this new undue burden of disclosure would likely limit informal constructive dialogue, make the relationship between shareholders and corporate management more adversarial, and lead to the filing of more shareholder resolutions rather than fewer.

The disclosure provisions proposed by the Commission would greatly interfere with the productive process of dialogue between companies and shareholders. Proof of the benefits of dialogue between companies and proponents is found in the steady drop of no-action requests to the Commission.[15] In 2007, the Staff received and responded to 356 no-action requests, compared to 370 in 2006. These numbers represent a sharp drop from 450 no-action requests in 2004 and 2005, and in our opinion reflect greater success by companies and shareholders in negotiating a mutually beneficial resolution of these issues.

The AFL-CIO is however supportive of clear, definable disclosure requirements that institutional investors could feel confident they understood and could comply with. We believe the existing disclosure regime in the area of proxy activity provides the Commission with multiple possibilities in this area.

For a more detailed analysis of the issues raised by the disclosure language in the proposed rule, we would call the Commission's attention to comments on file from the Council of Institutional Investors and TIAA-CREF. There are also further materials on this subject available on the Council of Institutional Investors website at www.cii.org.

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[15] http://www.thecorporatecounsel.net/blog/index.html

II. RESOLUTIONS UNDER RULE 14a-8

The AFL-CIO remains greatly concerned about potential changes to Rule 14a-8. The current Rule 14a-8 concerning non-binding resolutions has worked well for more than 30 years to allow shareholders to raise significant governance and policy issues that affect the long-term interests of investors. Consequently, the AFL-CIO would strongly and vehemently oppose any changes at this time.

In its release, the Commission poses for comment several open-ended questions in relation to the filing of non-binding resolutions under Rule 14a-8. These questions, if reformulated later by the Commission as formal rules changes, would significantly curb – if not eliminate – the rights of shareholder to file non-binding resolutions.

a) Opt-Out Provision

The AFL-CIO is particularly concerned by the question of whether corporations should be able to adopt a bylaw amendment, either by shareholder vote or board vote, that would allow a company to opt-out of federal regulation under Rule 14a-8.

Under Delaware law, a company need not seek shareholder approval for a change in its bylaws; a simply majority vote of the board is sufficient. Since 50% of all U.S. publicly traded companies and 60% of the Fortune 500 companies are incorporated in Delaware[16], this easy procedure to opt-out of Rule 14a-8 would be widely available.

We believe that this change would allow corporations, with a poor record of responsiveness to shareholders, to remove one of the few tools whereby shareholders can hold corporate management accountable. Consequently, the AFL-CIO opposes any change that would allow companies to opt-out of federal regulation under Rule 14a-8 and silence company owners.

In general, the AFL-CIO believes that core investor rights under the Federal Securities laws should not be waivable by majority vote. Our view is consistent with the approach in state law that holds that a majority of shareholders cannot waive a breach of fiduciary duty to the corporation or render harmless a violation of individual shareholder rights such as the right to cast one's vote at an annual meeting.

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[16] http://www.corp.delaware.gov/aboutagency.shtml [accessed 8/29/07]

b) Electronic Communications

The AFL-CIO believes that encouraging dialogue among investors is in general positive. If the Commission wishes to pursue an approach of making it easier for shareholders to communicate with each other electronically, for instance by creating non-solicitation presumptions for electronic forums outside of a quiet period around the annual meeting date, the AFL-CIO would encourage such initiatives. We would only support this approach as supplemental to shareholders' existing rights under Rule 14a-8.

The Commission poses the question of whether it should permit companies to use electronic petitions for non-binding resolutions in lieu of Rule 14a-8. The AFL-CIO strongly opposes the replacement of non-binding resolutions by these electronic petitions. If the Commission intends to go down this route, it should issue a formal rule change.

c) Submission Thresholds

The Commission asks if "a higher ownership threshold, such as $4,000 or $10,000, [would] be appropriate?" We are concerned by the effect of this threshold increase on individual investors, particularly those that invest through an Employee Stock Ownership Plan (ESOP). Small investors often file resolutions on important corporate governance issues that win considerable support. Consequently, we believe that it would be antithetical to the Commission's mission of protecting small investors and promoting good corporate governance if the Commission were to increase the ownership thresholds.

The Commission also asks if it should increase the resubmission thresholds of resolutions that deal with the same subject. The current resubmission thresholds stand at 3% to re-file a shareholder proposal after the first year, rising to 6% the subsequent year, and 10% the next year and every year thereafter. The Commission floats the idea of whether it should increase these resubmission thresholds to 10%, 15%, and 20% respectively.

The current resubmission thresholds allow shareholders to vote down unpopular or frivolous resolutions and should therefore not be changed. Over the past 40 years, resolutions on many subjects initially received low votes until shareholders became more informed and gave greater support. By increasing the thresholds, the Commission would cut out of the debate subjects that could later command significant or even majority shareholder support.

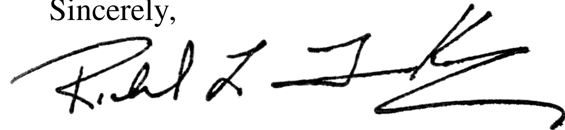
If the Commission intends to propose changes to these thresholds, it should formally propose a rule change. In anticipation of any potential proposal, the AFL-CIO fervently opposes any increase in ownership thresholds or resubmission thresholds.

CONCLUSION

We believe the Commission should reject both proposed rules. There is no compelling reason for the Commission to make any of the changes that it has raised. In fact, as we have outlined above, there are many reasons why the Commission should not undermine shareholder rights by adopting these damaging and flawed proposals.

The Commission should withdraw both of its proposed rules and instead allow shareholders to road test the new opportunities available as a result of the AIG decision. Moreover, the AFL-CIO sees no need for the Commission to make any changes in Rule 14a-8 and would vigorously oppose any changes in the rules regarding non-binding resolutions.

Sincerely,



Richard Trumka
Secretary-Treasurer